

IN THE MATTER OF	*	BEFORE THE
Two Farms, Inc. t/a Royal Farms		
504 Edmondson Avenue (first offense)	*	BOARD OF APPEALS
7204 York Road (first offense)		
7204 York Road (second offense)	*	OF
2700 Taylor Avenue (second offense)		
15 Hanover Road (first offense)	*	BALTIMORE COUNTY
504 Edmondson Avenue (second offense)		
9620 Belair Road (first offense)	*	CASE NO: CBA-17-028,
		CBA-17-029, CBA-17-030,
Re: Tobacco Enforcement Citations for distribution	*	CBA-17-031, CBA-17-032,
of tobacco products and/or paraphernalia		CBA-17-034, AND CBA-17-035
to a minor	*	

\* \* \* \* \*

**OPINION**

This matter came before the Board of Appeals for Baltimore County (the “Board”) as a Record Appeal from the Administrative Law Judge’s (“ALJ”) Findings of Fact and Conclusions of Law dated February 3, 2017, February 8, 2017, and March 7, 2017 regarding Tobacco Enforcement Citations at five (5) Royal Farms locations in Baltimore County in Violation of Baltimore County Code Article 13, Title 12, Section 13-12-101 *et seq.*, for the distribution of tobacco products and/or paraphernalia to a minor.

A hearing was held before this Board on May 16, 2017. Judah Fuld, Esquire appeared on behalf of Two Farms, Inc. t/a Royal Farms (“Royal Farms”). Assistant County Attorney Renee Phillips-Farley, Esquire appeared on behalf of Baltimore County.

**Evidence**

As this case comes before the Board as a Record Appeal of a Code Enforcement Hearing, the Board’s review of the ALJ’s decisions is solely based on the record from the hearings below on January 17, 2017 and February 22, 2017 and the oral argument presented before this Board.

In the matters of: Two Farms, Inc. T/A Royal Farms

Case numbers: CBA-17-028, CBA-17-029, CBA-17-030, CBA-17-031, CBA-17-032, CBA 17-034, and CBA-17-035

Case Nos.: CBA 17-028, 17-034 504 Edmonson Avenue.

Case No. 17-028

The transcript indicates that on December 20, 2016 at approximately 5:30 pm, Health Enforcement Officer (“HEO”) Brooks Miller and an unidentified Tobacco Compliance Assistant (“TCA”) were working together to verify compliance by Royal Farms regarding the sale of tobacco to minors at 504 Edmonson Avenue. Before entering the store, the HEO checked the TCA’s ID to make sure that it reflected that the TCA was under the age of 18. (T. 1/17/17, p. 9, 13). The HEO inspected the TCA’s personal belongings and had the TCA turn out his pockets to ensure that he did not possess any tobacco products. HEO Miller also supplied the TCA with petty cash to make the purchase. (Id. at 9, 13). The HEO followed the TCA into the Royal Farms store, stood in line directly behind the TCA, and observed the TCA purchase a pack of Newport cigarettes. (Id. at 10). The HEO testified that the store clerk did not request ID. (Id.)

After leaving the store, the HEO took the tobacco from the TCA and wrote a citation. (Id.)  
The HEO re-entered the store and served it on the store manager. (Id.)

Case No. 17-034.

On December 28, 2016 HEO Steven Anderson conducted a compliance test of the same Edmonson Avenue store. HEO Anderson met his TCA, had him empty his pockets into a plastic bag and checked his state-issued ID to verify that it showed the TCA was under the age of 18. The ID was kept in a translucent case. (T. 2/22/17, p. 59, 65). The HEO also verified that the TCA had no tobacco products on him and then gave the TCA \$20 to make a tobacco purchase. (Id. at 59).

Upon entering the store, the HEO positioned himself in line behind the TCA. The HEO saw and heard the TCA ask for Newport cigarettes, and the clerk request ID. (Id. at 59-60). The TCA handed the clerk his ID, but there is some dispute about whether or not the clerk removed the ID from the case. (Id. at 59, 66, 80). Regardless, another employee, later identified as Store Leader/Manger Marc Zubrowski, was also at the counter and next to the clerk serving the TCA. According to the HEO, Mr. Zubrowski told the first clerk that if the ID would not scan, he should manually “punch it in.” (Id. at 59-60, 79). It is not clear if the clerk did in fact manually enter the birthdate and Mr. Zubrowski testified that he did not see him do so. (Id. at 84). Mr. Zubrowski testified further that he had spoken to the clerk previously about the policies for manually entering in birthdate information. (Id. at 84).

The HEO saw the TCA purchase the cigarettes and then waited outside for the TCA. (Id. at 60). The HEO took the cigarettes and the change, wrote a citation, and gave it to an individual identified as the supervisor. (Id.). That supervisor, Mr. Zubrowski, was the individual who told the first clerk to punch in the information. The citation was for \$1,000 since it was the store’s second violation.

Case No.: CBA 17-031 2700 Taylor Avenue.

The transcript indicates that on November 16, 2016 at approximately 5:00 pm, Health Enforcement Officer (“HEO”) Nick Palmere and an unidentified Tobacco Compliance Assistant (“TCA”) were working together to verify compliance by Royal Farms regarding the sale of tobacco to minors at 2700 Taylor Avenue. Prior to entering the store, HEO Palmere checked the TCA’s ID to make sure that it reflected that the TCA was under the age of 18, and that information on the ID matched that given to the HEO by his supervisor. (T. 1/17/17, p. 42-43). The HEO made sure there that the TCA had no other tobacco products and no other identification. (Id.). The HEO

followed the TCA into this Royal Farms store, and saw the TCA ask for a pack of Dutch Masters Cigars. The clerk asked for ID but did not appear to review the ID. (Id. at 43). Instead, HEO Palmere observed the clerk put the ID up to the scanner, and then turn around and sell the cigars to the TCA. (Id. at 43-44, 55). Mr. Palmere was not in a position to see the scanner, but also noted that he did not hear the scanner ‘beep’ or otherwise indicate an actual scanning. (Id. at 44, 51).

The TCA left the store. The HEO followed, retrieved the tobacco product from the TCA, and wrote a citation to the store. The amount of the citation was \$1,000, rather than \$500 because it was this store’s second offense. (Id.) The HEO re-entered the store and served it on the store’s assistant manager, but the assistant manager refused to sign it. (Id. at 44-45). The store clerk then handed the HEO a phone to speak with the store manager. The manager had not been at the store during the test, but nonetheless contended that the TCA’s conduct was fraudulent. (Id. at 47-48).

Case Nos.: CBA 17-029, 17-030 7204 York Road.

Case No. 17-029

The transcript indicates that on December 7, 2016, Health Enforcement Officer Marvin Collins picked up his TCA at an agreed upon location. HEO Collins checked the TCA’s license and made sure that the government-issued license showed that the TCA was under the age of 18. (T. 1/17/17, p. 58-59). The HEO also checked the identifying information regarding the TCA that the HEO’s supervisor had provided to ensure it was a match. (Id. at 78). HEO Collins asked the TCA if he had any tobacco products and asked the TCA to turn out his pockets so that the HEO could check to ensure that the TCA did not possess any such products. (Id. at 59, 72). The HEO gave the TCA money for the tobacco purchase, and at approximately 5:00 pm, they entered the Royal Farms store at 7204 York Road to begin the compliance testing.

The HEO, who was in line and to the left of the TCA, observed the TCA go to the counter and ask for a pack of Grizzly's, a brand of snuff. According to HEO Collins, he observed the clerk turn around, pick up the tobacco product and sell the product to the TCA. (Id. at 60, 79). The clerk did not request ID from the TCA. (Id.)

After the TCA exited the store, the HEO himself made a purchase lasting less than a minute, and then left the store. He took possession of the tobacco product from the TCA, and wrote a citation assessing a fine of \$500 against the store. (Id.). The HEO also wrote a Correction Notice for failure to demand identification prior to purchase of a tobacco product. (Id.) HEO Collins gave the citation to a woman identified as the store's Shift Supervisor. (Id. at 61). After serving the citation, HEO Collins also provided store personnel with instructional material regarding the sale of tobacco and how to check identification. (Id. at 62).

Case No. 17-030

On December 27, 2016, HEO Jeffrey McCleese picked up a TCA at a specified location to conduct a compliance test at the same Royal Farms store at 7204 York Road. (T. 1/17/17, p. 82). The HEO checked the TCA's ID, made sure he had no other ID on him, and that he did not possess any tobacco product. (Id. at 83, 94). The HEO also checked the ID against information on the TCA previously provided by his supervisor. (Id. at 88, 93). Both individuals entered the store, and HEO McCleese stood right behind the TCA and observed the TCA request a pack of Newport Shorts. The clerk asked for ID and for the TCA's date of birth. (Id. at 83, 90). The TCA showed his ID, and pointed out his birthdate, but the clerk nonetheless sold the TCA the tobacco product. There was no testimony regarding the clerk's use of a scanner. (Id. at 83, 91, 94, 97). The TCA then left the store. The HEO then cashed in some lottery tickets and promptly exited the store. (Id.) HEO

In the matters of: Two Farms, Inc. T/A Royal Farms

Case numbers: CBA-17-028, CBA-17-029, CBA-17-030, CBA-17-031, CBA-17-032, CBA 17-034, and CBA-17-035

McCleese retrieved the tobacco products from the TCA and wrote a citation. He was aware the store had been cited previously and therefore assessed the amount of \$1,000. (Id. at 92). He handed the citation to Kim Davis who stated she was the store manager.

Case No.: CBA 17-032 15 Hanover Road.

On November 21, 2016, HEO Christopher Johnson picked up a TCA and proceeded to a compliance test at the 15 Hanover Road Royal Farms store. (T. 1/17/17, p. 100). Before driving to the store, the HEO asked to see the TCA's ID and verified that the date of birth was the same as on the assignment informational sheet provided by his department. (Id. at 100, 104). He also asked the TCA if he had any tobacco products on his person and verified the negative response by having the TCA empty his pockets and turn them inside out. (Id. at 100, 105).

The HEO followed the TCA into the store and stood right beside him. The HEO observed the TCA ask for Newport 100's and the store clerk ask for the TCA's ID. According to HEO Johnson, it appeared as if the clerk scanned the ID but the clerk still proceeded to sell the cigarettes to the TCA. (Id. at 101). The HEO further testified that he saw the clerk put the ID in front of his person, perhaps in front of the scanner, but that the HEO did not hear a 'beep' from the scanner or see a red light thereon. (Id. at 101). The HEO did not observe the clerk actually reviewing the ID. (Id. at 102). The TCA left the store and the HEO followed. The HEO retrieved the tobacco product and filled out a citation in the amount of \$1,000 as he was aware of a prior citation to this store. He gave the citation to the individual identified as the store manager. (Id. at 102.).

Case No.: CBA 17-035 9620 Belair Road.

The transcript indicates that on January 9, 2017 HEO Marvin Collins picked up his TCA at an agreed upon location. HEO Collins checked the TCA's ID, looked at the picture to see if it

was the same person as the TCA, and looked at the TCA's date of birth to ensure that it showed that the TCA was under the age of 18. (T. 2/22/17, p. 92-93). HEO Collins also verified the ID against the information on his assignment sheet from his supervisor. (Id. at 98). The HEO asked the TCA to turn out his pockets so that the HEO could check to ensure that the TCA did not possess any tobacco, money or other ID. (Id. at 93, 101). The HEO gave the TCA \$10 for the tobacco purchase, and at approximately 4:00 pm, they entered the store.

HEO Collins entered the store before the TCA and stood in front of a checkout counter. He was about 8-10 feet from the TCA and had a clear unobstructed view when the TCA entered the line and asked for a pack of Camel Blue cigarettes. (Id. at 94, 96). The store clerk asked for ID, the TCA gave the clerk his ID and the clerk returned the ID to the TCA. (Id.). The TCA began to exit the store, but the clerk called him back and then sold the cigarettes to the TCA. (Id. at 94-95.). After HEO Collins and the TCA exited the store, the HEO took the cigarettes, wrote the citation and returned to the store to issue the citation. (Id.).

In addition to the testimony from the HEOs regarding the testing at particular stores, Victoria Keller, a Human Services Program Manager for the Baltimore County Department of Health, also testified at the February 22 hearing. Ms. Keller manages the Substance Use Prevention and Tobacco Programs for the County and oversees hiring the TCAs. (T. 2/22/17, p. 7). Ms. Keller stated that the Department recruits TCAs through the Police Explorer Programs, Baltimore County Public Schools, and through word of mouth. (Id.). Guidance counselors at various public schools refer candidates to the program. (Id. at 38). To her knowledge, none of the applicants are 'in trouble' with law enforcement or participate in the program to earn credit to resolve a situation with law enforcement. (Id. at 18).

Per Ms. Keller, the TCAs must be 16 or 17 years old, and need two forms of ID to apply for the job. At the interview, they must present original identification; either a learner's permit, provisional license, and a Social Security card and/or a birth certificate or passport. (Id. at 8-9). They also must provide a work permit and a parental consent form. (Id. at 10). Either the parents sign the consent form at the interview or the County arranges for the parent to come in and sign the form at another time. The County does not process an applicant without a signed consent form. (Id. at 12). The TCAs are Baltimore County employees, and are paid \$9.18 per hour, without any benefit for fines they generate. (Id. at 13).

The TCAs use their own IDs for the tobacco purchases. Questioned about the steps the County takes to verify the authenticity of the IDs, Ms. Keller testified that she does not check with the issuing governmental agency to confirm the authenticity of the IDs, but has "no reason to believe they were not authentic documents." (Id. at 19). Ms. Keller also stated that she verifies that the information on the various IDs matches that on the work permits (Id. at 20- 22). The Department does not provide any training to the HEOs regarding recognition of fraudulent IDs. (Id. at 47). Ms. Keller also testified that some of the TCAs have been harassed by tobacco licensees. Licensees have taken their IDs, tried to copy the IDs, yelled at the TCAs, etc. (Id. at 41).

### **Standard of Review**

Appeals from Code Enforcement hearings are limited to the record created before the Administrative Law Judge. That record includes all exhibits and other papers filed with the Administrative Law Judge, and the written findings and final order of the Administrative Law Judge (*Baltimore County Code* §3-6-303 ("BCC")).

In deciding a code enforcement appeal, under BCC, § 3-6-304, the Board of Appeals may:



- (i) Remand the case to the Hearing Officer,
- (ii) Affirm the final order of the Hearing Officer, or
- (iii) Reverse or modify the final order if a finding, conclusion, or decision of the Code Official or Hearing Officer:

1. Exceeds the statutory authority or jurisdiction of the Code Official or Hearing Officer;
2. Results from an unlawful procedure;
3. Is affected by any other error of law;
4. Subject to paragraph (2) of this section, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
5. Is arbitrary or capricious.

### **Decision**

Prior to addressing the merits here, we incorporate herein in their entirety our prior Opinion dated August 11, 2016 in Case Nos. CBA-16-043, CBA-16-044, CBA-16-045, CBA-16-046, and CBA-16-049, and our Opinion dated October 11, 2016 in Case Nos. CBA-16-053, CBA-17-001, CBA-17-00 and CBA-17-005.

#### I. The Entrapment Defense.

Although not argued at length, counsel again raised the specter of the entrapment defense. As we held in the decisions identified above, the entrapment defense is not applicable in situations of the type before us. Moreover, on March 28, 2017 in the matter of Two Farms, Inc., Case number 03-C-16-009417, the Circuit Court for Baltimore County, affirmed the Board's opinion on this issue. The ALJ similarly found that in the cases before us, the County's compliance testing does not constitute entrapment. Counsel has not directed us to any element of fact or law which would compel a contrary conclusion, and we affirm the ALJ's decision in this respect.

II. The Minor Tobacco Compliance Assistants' Failure to Testify In the Administrative Proceeding

Counsel for Royal Farms also briefly touched upon the fact that in the cases before the ALJ, the minor TCAs do not appear at the proceeding, but rather their hearsay statements and actions were introduced by way of the HEOs who appeared at the hearing. Royal Farms has argued previously and continues to argue that it was therefore deprived of the right to confront adverse testimony. As we have stated in our earlier opinions referenced above, the County's reliance on the respective HEOs for testimony regarding the specifics of each of the store citations is sufficient and the TCA's testimony is not required. The Circuit Court has affirmed this conclusion. In his Final Order, the ALJ similarly held that "the testimony of the HEO is more than sufficient to establish the county's allegation of the violation." We agree with this conclusion and affirm this portion of the ALJ's Order as well.

III. Verification of the TCA's Identity Card.

In the May 16, 2017 hearing before us, and in the hearing before the ALJ, Royal Farms emphasized that neither the HEOs nor the County take steps to verify with the issuing governmental agency the authenticity of the IDs used by the TCAs in the application and purchase process. Royal Farms points to the statutory provision indicating that a tobacco licensee may not distribute tobacco products to a "minor" BCC §13-12-103(a) and argues that without such verification, there is insufficient proof that a sale was indeed made to an actual minor.

In this regard, we agree with the ALJ that:

The central issue here is not whether the HEO is conversant with the details and subtleties of the government ID presented by the TCA. . . . I believe that even if the proffered ID was created solely for the purpose of being used by the TCA . . . the simple central fact is that a document which on its face is a government issued ID showing the TCA is under the age of 18, is given to the store clerk as proof of age. It is then up to the clerk to determine if the age on the ID entitles the person

producing it to purchase a tobacco product. The clerk also is not an expert in the subtleties of ID's. He or she is given a document that on its face shows an age which does not entitle the bearer to purchase tobacco . . . .

(ALJ's Findings of Fact and Conclusions of Law, at 5 (emphasis in original)). Ms. Keller testified that her office relies upon multiple forms of government-issued IDs as well as parental consent to ensure that the TCAs are indeed minors, under the age of 18. Further, each HEO testified that he confirms the identity and asserted age of the TCA by checking the TCA's ID against the information provided by the County. Royal Farms presented nothing other than mere speculation to indicate that any of the TCAs were not in fact minors, presented any fraudulent IDs, or had any incentive to falsify their identification papers. The evidence instead shows that store clerks simply failed to examine the tendered ID, improperly inputted into the scanner the birthdate information, or failed to recognize that that the proffered ID plainly showed the TCA's age to be under 18. We find no error of law or fact in the ALJ's decision, and reject the notion that the statutory scheme requires such a heightened level of proof and verification as Royal Farms suggests.

### **Conclusion**

For all of the above reasons, the decisions of the ALJ in Case Nos: CBA-17-028, CBA-17-029, CBA-17-030, CBA-17-031, CBA-17-032, CBA-17-034 and CBA-17-035 shall be affirmed.

### **ORDER**

**THEREFORE, IT IS THIS 31<sup>st</sup> day of May, 2017, by the Board of Appeals of Baltimore County,**

**ORDERED**, that the decision of the Administrative Law Judge dated February 3, 2017 with regard to the Royal Farms store located at 504 Edmonson Avenue, Case No: CBA- 17-028, be and the same is hereby **AFFIRMED**; and it is further

**ORDERED**, that the decision of the Administrative Law Judge dated March 7, 2017 with regard to the Royal Farms store located at 504 Edmonson Avenue, Case No: CBA- 17-034, be and the same is hereby **AFFIRMED**; and it is further

**ORDERED**, that the decision of the Administrative Law Judge dated February 8, 2017, 2017 with regard to the Royal Farms store located at 7204 York Road, Case No: CBA- 17-029, be and the same is hereby **AFFIRMED**; and it is further

**ORDERED**, that the decision of the Administrative Law Judge dated February 8, 2017, 2017 with regard to the Royal Farms store located at 7204 York Road, Case No: CBA- 17-030, be and the same is hereby **AFFIRMED**; and it is further

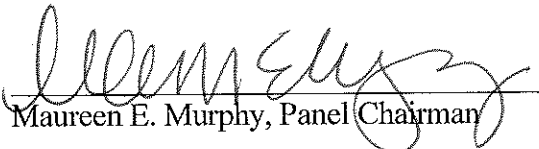
**ORDERED**, that the decision of the Administrative Law Judge dated February 8, 2017, 2017 with regard to the Royal Farms store located at 15 Hanover Road, Case No: CBA- 17-032, be and the same is hereby **AFFIRMED**; and it is further

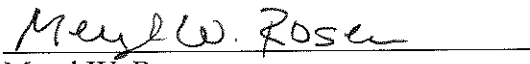
**ORDERED**, that the decision of the Administrative Law Judge dated February 8, 2017, 2017 with regard to the Royal Farms store located at 2700 Taylor Avenue, Case No: CBA- 17-031, be and the same is hereby **AFFIRMED**; and it is further

**ORDERED**, that the decision of the Administrative Law Judge dated March 7, 2017 with regard to the Royal Farms store located at 9620 Belair Road, Case No: CBA- 17-035, be and the same is hereby **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chairman

  
Meryl W. Rosen

  
James H. West



## Board of Appeals of Baltimore County

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May 31, 2017

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RE: *In the Matter of: Two Farms, Inc. t/a Royal Farms*  
Case Nos.: CBA-17-028; CBA-17-029; CBA-17-030; CBA-17-031;  
CBA-17-032; CBA-17-034; and CBA-17-035

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington  
Administrator

KLC/tam  
Enclosure  
Duplicate Original Cover Letter

c: Two Farms, Inc. t/a Royal Farms  
Lawrence Stahl, Managing Administrative Law Judge  
Stephen Anderson, Health Enforcement Officer/Health and Human Services  
Marvin Collins, Health Enforcement Officer/Health and Human Services  
Christopher Johnson, Health Enforcement Officer/Health and Human Services  
Jeffrey McCleese, Health Enforcement Officer/Health and Human Services  
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